IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 391 of 2007

Decided on : 16th November, 2009

Rajinder Thakur and others **...Appellants.**

Versus

State of H.P. **...Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellants : **Mr. Vinay Thakur, Advocate.**

For the Respondents : **Mr. Ramesh Thakur, Assistant Advocate General.**

Surjit Singh, Judge (Oral)

Appellants Rajinder Thakur, Vijay Thakur and Surjeet Khachi have appealed against the judgment, dated 6th September, 2007, of learned Sessions Court, Kinnaur at Rampur Bushahr, whereby all of them have been convicted of offences of murder and robbery, with the aid of Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life, which will not be less than 20 years, in jail, and there will be no parole for first 10 years and fine of Rs.2 lacs; in default of payment of fine to undergo simple imprisonment for a further period of five years, in respect of offence, under Section 302 IPC and to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/-; in default of payment of fine to undergo simple imprisonment

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Whether reporters of the local papers may be allowed to see the judgment?

for a further period of two years, in respect of offence, under Section 392 IPC.

2. Prosecution case, as per evidence on record, is like this. Deceased Santosh Kumar son of PW-1 Bir Chand was employed as a driver by PW-2 Ganga Ram to drive his Maruti Van, which he had purchased only a few days prior to the occurrence. The date of occurrence is 21st August, 2004. The van had yet not been registered with the Registration Authority, though application for registration had been moved. On 21st August, 2004, all the three appellants were looking for a taxi as they wanted to escort a truck, carrying timber. They got lift in a truck at Narkanda for going to Sainj to hire a taxi. The truck by which they went to Sainj was being driven by PW-30 Rajesh Kumar. It was carrying merchandise, belonging to PW-30- Rajesh Kumar, who too was on board the truck. At Sainj, the appellants hired Maruti Van of PW-2 Ganga Ram, the number of which had been applied for, on which deceased Santosh Kumar had been engaged, as a driver. The van started from Sainj for Narkanda, late in the evening. On the way, deceased Dharam Pal, an electrician, working at a place called Kingar, was approached by deceased Santosh Kumar to accompany him. Deceased Dharam Pal then boarded the van. Thereafter deceased Santosh Kumar alongwith his van went missing. PW-2 Ganga Ram, the owner of the van, started searching for him.

3. On 25th August, 2004, PW-2 Ganga Ram met PW-1 Bir Chand, the father of Santosh Kumar, at Luhri and asked him if Santosh Kumar had visited his house. PW-1 Bir Chand told him that he had not come home. Then both of them started searching for the van as also deceased Santosh Kumar. Report was lodged with the police at Police Station, Kumarsain by PW-2 Ganga Ram, about deceased Santosh Kumar having gone missing alongwith Maruti Van. This report was made on 24th August, 2004. It was entered in the Rojnamcha. Copy of the entry is Ext. PW47/A.

4. On 26th August, 2004, one lady, namely PW-18 Shano Devi spotted two dead bodies in Thachru Nallah, which falls by the side of the road, connecting Sainj with Narkanda. She informed her co-villagers. Police was informed telephonically. Entry regarding telephonic information was made in the Daily Diary. Copy of the same is Ext. PW37/A. PW-49 ASI Sada Nand went to the spot accompanied by PW-1 Bir Chand, the father of deceased Santosh Kumar, PW-2 Ganga Ram, the owner of the Maruti Van, and PW-3 Talru Ram, the father of deceased Dharam Pal. Dead bodies were identified to be those of Santosh Kumar and Dharam Pal. Both of them had been strangulated, one by means of a string of jacket's hood and another by means of a handkerchief. Also, there were injuries on their heads. A Danda Ext. P1 was also found lying on the spot.

5. PW-1 Bir Chand made a statement, under Section 154 Cr. P.C. to PW-49 ASI Sada Nand. The said statement is Ext. PW49/A. It was sent to the Police Station for registration of the case, where FIR Ext. PW48/A was recorded by PW-48 ASI Rattan Chand. Inquest was conducted by PW-49 ASI Sada Nand and Forms Exts. PW1/A, PW1/B and PW1/C were filled in. Dead bodies were sent to Community Health Centre, Kumarsain, where postmortem examination was conducted by a team of doctors, consisting of PW-32 Dr. Ramesh Chand Guleria, PW-33 Dr. N.K. Mehta and PW-43 Dr. Sumeet Attri. The doctors found injuries on the heads of both the dead bodies and they also found that the necks of the deceased had been tightened with a string of jacket's hood and a handkerchief. They gave the opinion that the cause of death, in both the cases, was head injuries and asphyxia, caused by strangulation. Postmortem reports are Exts. PW32/B and PW32/D.

6. On 27th August, 2004, the Maruti Van, in question, was found abandoned at Saproon on Solan-Subathu Road. It was taken into possession by PW-36 ASI Sukhdarshan Singh, Incharge of Police Post, Saproon. Later on, the van was handed over to PW-50 SI Rupinder Singh, who was associated with the investigation of this case.

7. When no perceptible progress was achieved in the investigation of the case, a special team of police was constituted by Superintendent of Police, Shimla, vide order

Ext.52/A. PW-50 Vijay Kumar was one of the members of that team. He arrested the present appellants on 20th February, 2005.

8. During the course of their interrogation, appellants made disclosure statements. Appellant Surjeet Khachi made disclosure statement Ext. PW11/B that he had thrown one Chunni and one ribbon, which were there in the van, at a place called Nanni, falling in the area of Matiana. On the basis of this disclosure statement, Chunni Ext. P-2 and ribbon Ext. P-3, were recovered and taken into possession vide memo. Ext. PW2/B. PW-2 Ganga Ram, the owner of the van, identified the said Chunni and the ribbon to be the same, which he had kept in the Maruti Van. Appellant Surjeet Khachi also made a disclosure statement that wrist watch of appellant Rajinder had been pledged with a shopkeeper of Kuthar in Solan District for payment of price of 1½ litre of petrol, which had been purchased from him, when the fuel in the Maruti Van completely ran dry. On the basis of this disclosure statement, wrist-watch Ext. P-4, belonging to appellant Rajinder, was recovered from PW-16 Gian Chand of village Kuthar. House of appellant Rajinder Thakur was searched and two vouchers Exts. PW54/O and PW54/P, with regard to the purchase of wrist watch Ext. P4, were recovered from his house, vide memo. Ext. PW24/A.

9. Appellant Vijay Thakur made a disclosure statement, which led to the recovery of Jacket Ext. P5 from

his house. The string of Jacket's hood was found missing and it appeared that it was the same string by which the neck of deceased Dharam Pal was found tightened.

10. During the course of investigation, it also came to light that the appellants went with the Maruti Van to some remote area of Patiala District in Punjab State and tried to sell it, but they could not find any buyer. Then they came back and on the way, when the fuel ran dry, completely, they purchased 1½ litre of petrol from PW-16 Gian Chand and when that fuel was consumed, they abandoned the vehicle at Saproon on Solan-Subathu road. Appellant Rajinder then tried to sell the Maruti Van to a transporter of Dhalli, namely PW-8 Vikas Verma. He (PW-8 Vikas Verma) introduced appellant Rajinder to PW-42 Sneh Bhagat, who accompanied by appellant Rajinder and PW-10 Dharmender, a driver, went to Saproon, but by that time the Maruti Van had already been seized by the police, under Section 102 Cr. P.C. and taken to Police Post, Saproon.

11. On completion of investigation, all the three appellants were challaned. Case was committed by the concerned Judicial Magistrate to the Sessions Court, after complying with the requirement of Section 207 Cr. P.C. Sessions Court charged the appellants with the offences, under Sections 302 and 392 read with Section 34 IPC and on their pleading not guilty tried them for the said offences.

12. Appellants did not take any specific defence plea. They, however, denied that they had hired the Maruti Van of PW-2 Ganga Ram, driven by deceased Santosh Kumar or that they travelled by that van on or around 21st August, 2004. They also denied having taken lift in the truck of PW-3 Rajesh Kumar from Narkanda to Sainj. It was also denied by them that they took the van to the area of Patiala District in Punjab State or to Kuthar area of Solan District or attempted to sell the van in Patiala District or to one Piare Mohan and his son PW-42 Sneh Bhagat. They also denied having made disclosure statements, leading to the discovery of Chunni Ext. P2, Ribbon Ext. P3, wrist watch Ext. P4 and jacket Ext. P5.

13. Learned Sessions Court, on appreciation of evidence and after hearing the counsel for the parties, came to the conclusion that prosecution had succeeded in proving certain circumstances, which made a complete chain and those circumstances led to the hypothesis that all the appellants were guilty and to no other hypothesis and consequently, convicted and sentenced them, as aforesaid.

14. We have heard the learned counsel for the appellants as also the learned Assistant Advocate General and perused the evidence.

15. In our considered view, the following circumstances stand established, beyond any pale of doubt and they make a complete chain, leading to one and only one hypothesis that the appellants are guilty of murdering Santosh

Kumar and Dharam Pal and robbing Santosh Kumar of his Maruti Van:-

(a) On 21st August, 2004, appellants took lift in a truck which was being driven by PW-30 Rajesh Kumar and in which PW-39 Raj Kumar Tayagi was present in the capacity of owner of the goods, which were being carried in that truck, and they (appellants) de-boarded the truck at Sainj.

(b) Deceased Santosh Kumar had two passengers, who wanted to travel to village Dalash by his taxi, but in the meanwhile, he was approached by some other passengers for being taken to Narkanda and, so, he approached PW-7 Sanjay Kumar, another taxi driver, to carry the two passengers to Dalash.

(c) Appellant Rajinder made an attempt to sell a Maruti Van to PW-44 Kartar Singh resident of a village in Patiala District.

(d) Appellants ran out of fuel at Kuthar in Solan District on 24th August, 2004 and they purchased 1½ litres of petrol from PW-16 Gian Chand, a shopkeeper and being short of money, they pledged the wrist-watch Ext. P4 of appellant Rajinder Thakur with said Gian Chand (PW16).

(e) On 27th August, 2004, appellant Rajinder Thakur went to PW-8 Vikas Verma and asked him to help him sell the Maruti Van, who (the witness) then introduced him

to PW-42 Sneh Bhagat and Sneh Bhagat accompanied by driver PW-10 Dharmender Singh and appellant Rajinder went to Saproon, where the van was stated to be parked, but the van was not there as the same had been seized by Solan Police, before that, under Section 102 Cr. P.C.

(f) Appellant Surjeet Khachi made a disclosure statement, leading to the discovery of Chunni Ext. P-2 and ribbon P-3, which PW-2 Ganga Ram had kept in the Maruti Van.

(g) Appellant Vijay Kumar made a disclosure statement, leading to the discovery of Jacket Ext. P-5, the hood string of which was missing.

16. Evidence, which we are going to discuss and analyze hereinafter, proves all the aforesaid circumstances to the hilt. We proceed to take up the aforesaid circumstances one-by-one for discussion and findings thereon.

Circumstance (a)

17. Though PW-30 Rajesh Kumar, the driver of the truck, denied that the appellants took lift in his truck from Narkanda to Sainj, he did not deny the fact that his truck travelled from Chandigarh to Kinnaur with the merchandise of PW-39 Raj Kumar Tayagi and that on 21.8.2004 it crossed Narkanda and Sainj, in the evening. Also, he did not deny that PW-39 Raj Kumar Tayagi, in the capacity of owner of merchandise, carried in the truck, was also travelling in that

truck. PW-39 Raj Kumar Tayagi very categorically stated that the appellants travelled by the truck from Narkanda to Sainj. This witness runs a shop in Kinnaur District. He does not have any dealings with the appellants. Therefore, there should be no reason to disbelieve the witness, as he does not have any motive to falsely implicate the appellants. Also he is not related to either of the deceased. At the same time, testimony of PW-30 Rajesh Kumar cannot be believed as he was confronted with his statement to the police, under Section 161 Cr. P.C. by the prosecution, with the leave of the Court and he is contradicted by the said statement, which is Ext. PW53/A. Thus, this circumstance stands proved, beyond doubt.

Circumstance (b)

18. PW-7 Sanjay Kumar though did not prove all the facts for which prosecution examined him, yet he did prove the fact that on 21st August, 2004, deceased Santosh Kumar was driver on a Maruti Van, which was un-numbered and the registration of which had been applied for. He testified that deceased Santosh Kumar told him that he had two passengers with him, who wanted to go to village Dalash and that at the same time he had some passengers, who wanted to travel to Narkanda and, so, he requested him (the witness) to carry the passengers bound for Dalash in his (witness's) taxi to their destination and he accepted the offer. There is no reason to disbelieve the testimony of this witness, especially when it

was not challenged by the defence, during trial. Therefore, this circumstance also stands fully established.

Circumstance (c)

19. Prosecution examined PW-44 Kartar Singh resident of a village in Patiala District, who testified that his mother's cousin PW-19 Harnek Singh brought appellant Rajinder Singh to his place and the said appellant offered to sell a Maruti Van, which he refused to buy. The witness stated that he used to deal in sale and purchase of vehicles, during those days. No doubt PW-19 Harnek Singh did not support the prosecution version that he accompanied appellant Rajinder Thakur to the place of PW-44 Kartar Singh, but the witness is contradicted by his statement to the police, during investigation, with which he was duly confronted. The same is Ext. PW54/G. This circumstance also stands proved.

Circumstance (d)

20. PW-14 Mohan Lal testified that appellant Rajinder Thakur made a statement that he had pledged a wrist watch, belonging to him, with PW-16 Gian Chand of village Kuthar and that after making the said statement, said appellant took the police to village Kuthar and he also accompanied them. He stated that at Kuthar wrist watch was produced by PW-16 Gian Chand, which was identified by appellant Rajinder Thakur to be the same which he had

pledged with Gian Chand. He stated that wrist watch was taken into possession vide memo. Ext. PW14/A.

21. PW-16 Gian Chand, a shopkeeper of village Kuthar, stated that appellant Surjeet Khachi had visited his shop on 24.8.2004 and demanded petrol and that since the latter had no money to pay for the petrol, he pledged wrist watch Ext. P4 with him and lateron on 23.2.2004 all the appellants brought the police to his shop and the police asked him to produce the wrist watch, which he handed over to them, vide memo. Ext. PW14/A.

22. PW-17 Dinesh Kumar testified that appellant Surjeet Khachi had pledged a wrist watch, as security for the payment of price of petrol, amounting to Rs.62/-, with PW-16 Gian Chand and that lateron the police recovered the wrist watch from PW-16 Gian Chand, vide memo. Ext. PW14/A and when the police came to effect recovery of wrist watch on 23.2.2005, all the appellants were with them.

23. The fact that the wrist watch belongs to appellant Rajinder Thakur is proved by vouchers Exts. PW54/O and PW54/P, which were recovered from his house by PW-54 Inspector Vijay Kumar. As per vouchers Exts. PW54/O and PW54/P, wrist watch was purchased by appellant Rajinder Thakur from a shop at Chandigarh on 2.12.2003 for a sum of Rs.2100/-. Thus, this circumstance also stands fully established.

Circumstance (e)

24. On 27.8.2004, appellant Rajinder went to PW-8 Vikas Verma, one of his ex-class fellows, and requested him to help him sell a Maruti Van. PW-8 Vikas Verma testified this fact. He further testified that he introduced him to one Tony (PW42 Sneh Bhagat) and his (Tony's) driver Lucky, namely PW-10 Dharmender Singh. He stated that PW-42 Sneh Bhagat and PW-10 Dharmender Singh went to Saproon alongwith appellant Rajinder as the Maruti Van, offered to be sold by him, was stated to be parked there. The witness further stated that when they reached Saproon, van was not there. There should be no reason to disbelieve the testimony of PW-8 Vikas Verma, especially when he and the appellant had been class fellows and no motive was suggested to him for his making a false statement against appellant Rajinder. Testimony of PW-8 Vikas Verma is corroborated by PW-10 Dharmender Singh, who was cross-examined by the prosecution, with the leave of the Court, on account of his not supporting the prosecution version, on some material facts. He (PW-10 Dharmender Singh) admitted that he, Tony and Vicky (probably Tony is PW-42 and Vicky is PW-8) went to Saproon and that Tony and Vicky alighted from the vehicle at Saproon and went to some nearby place and after some time they returned and said that van was not there. The statement of the witness clearly indicates that he, Tony and Vicky had gone to Saproon to inspect a Maruti Van.

25. PW-42 Sneh Bhagat turned hostile and did not support the prosecution. His turning hostile, in no way, affects the credibility of PW-8 Vikas Verma and PW-10 Dharmender Singh, particularly when he (PW42 Sneh Bhagat) is contradicted by his statement to the police, with which he was duly confronted. The said statement is Mark A. Thus, this circumstance also stands fully established.

Circumstance (f)

26. Appellant Surjeet Khachi, while in custody, made a disclosure statement to PW-54 Inspector Vijay Kumar that he had thrown a Chunni and a ribbon, which were in the Maruti Van, at a place called Nanni near Matiana and could get the same recovered. Pursuant to this statement, PW-54 Inspector Vijay Kumar recovered Chunni Ext. P2 and ribbon Ext. P-3.

27. The aforesaid disclosure statement was made in the presence of PW-11 Bhim Singh and PW-12 Harbans Lal. Both these witnesses testified that appellant Surjeet Khachi made statement to the police that he had thrown a Chunni and a ribbon near village Matiana and could get the same recovered. Recovery of Chunni and ribbon was effected in the presence of PW-2 Ganga Ram, the owner of the Maruti Van, and PW-25 Parkash Chand. Both the witnesses stated that Chunni Ext. P2 and ribbon Ext. P3 were recovered by the police, at the instance of appellant Surjeet Khachi, from a

place called Nanni near Matiana and the aforesaid articles were taken into possession vide memo. Ext. 2/B. PW-2 Ganga Ram further testified that Chunni Ext. P2 and ribbon Ext P3 were the same, which he had kept in the van after performing Pooja, in connection with the purchase of new vehicle. Thus, this circumstance also stands proved, beyond doubt.

Circumstance (g)

28. PW-54 Inspector Vijay Kumar testified that on 26.2.2005 appellant Vijay Kumar made statement that he had kept a jacket with cap in the almirah of his house and that that statement was made by him in the presence of witnesses PW-23 Shiv Ram and PW-3 Talru Ram. PW-23 Shiv Ram fully corroborated the testimony of PW-54 Inspector Vijay Kumar. PW-3 Talru Ram also stated that appellant Vijay Kumar had made disclosure statement, record of which is Ext. PW3/C, that he had kept a jacket with cap in the almirah. Recovery of the jacket from the almirah of appellant Vijay Kumar is also proved by PW-28 Dayal Singh.

29. Pursuant to the aforesaid disclosure statement, appellant Vijay Kumar got recovered from an almirah kept in his house jacket Ext. P5, with hood, which did not have the string for adjusting/tightening the hood. A string of jacket's hood was found tightened around the neck of deceased Dharam Pal, per testimony of PW-32 Dr. Ramesh

Chand and postmortem report Ext. PW32/D. Thus, this circumstance also stands proved, to the hilt.

30. The aforesaid circumstances lead only to one hypothesis that the appellants committed the murder of Santosh Kumar and Dharam Pal and robbed Santosh Kumar of Maruti Van and to no other (hypothesis). Consequently, we dismiss the appeal as far as the conviction of the appellants for offences, under Sections 302 and 392 read with Section 34 IPC, is concerned.

31. As regards the sentence, we are of the considered view that the trial Court had no jurisdiction to order, while awarding sentence of life imprisonment, that the appellants shall be kept in detention for not less than twenty years and shall also not be granted parole for the first ten years. Courts, other than the Supreme Court, do not have any such power. Passing of this kind of order, in the nature of injuncting the statutory authorities from exercising their powers, amounts to preventing statutory authorities to exercise their statutory powers, which is not permissible under the law. It is only the Supreme Court, which can pass any order, including this kind of order, to do justice, in exercise of its extra-ordinary power, under Article 142 of the Constitution of India.

32. Also, we find that the sentence and fine awarded by the trial Court is disproportionate to the financial

capacity of the appellants. The appellants did not have the money even to buy fuel for the stolen van and one of them pledged his wrist watch as security for payment of a paltry sum of Rs.62/-.

33. Taking into account the above stated legal position as also the financial capacity of the appellants, we modify the order of sentence, passed by the trial Court, as follows.

34. All the appellants are sentenced to undergo imprisonment for life and to pay a fine of Rs.5000/-; in default of payment of fine to undergo rigorous imprisonment for a further period of one year each, for offence under Section 302 read with Section 34 IPC and to undergo rigorous imprisonment for five years and to pay a fine of Rs.2000/-; in default of payment of fine to undergo rigorous imprisonment for a further period of six months each, for offence under Section 392 read with Section 34 IPC.

With the aforesaid modification in the sentence part of the judgment of the trial Court, appeal is dismissed.

(Surjit Singh), J

16th November, 2009(ss) **(Surinder Singh), J.**